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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARGARITO VALENCIA BARAJAS,

Defendant and Appellant.

F066418

(Super. Ct. No. VCF255594)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Kevin L. Quade, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING OPINION

Margarito Valencia Barajas (defendant) was charged, by amended information, with commission of lewd acts on a child under the age of 14 (Pen. Code,[1] § 288, subd. (a); counts 1 & 2), and oral copulation of a child 10 years of age or younger (§ 288.7, subd. (b); count 3). He was also alleged to have suffered a prior conviction under the three strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) A jury convicted him of count 1, but acquitted him of counts 2 and 3, and he admitted the prior conviction allegation. His motion for a new trial was denied, but the trial court struck the prior conviction. Defendant was sentenced to eight years in prison and ordered to pay various fees, fines, and assessments.

On appeal, we hold: (1) the trial court properly found no violation of defendant's rights during jury selection; (2) defendant's inculpatory statement was properly admitted at trial; (3) defendant is not entitled to reversal based on the presence or conduct of the victim advocate; and (4) the fine imposed pursuant to section 294, subdivision (b) is unauthorized. We affirm the judgment as modified to strike that fine.

FACTS

I

PROSECUTION EVIDENCE

In the summer of 2011, J. was eight years old.[2] Defendant, his wife, and their two daughters lived down the street from J., and she often went to defendant's house to play with the two girls.

One day when they were playing, they went to the backyard to see chickens and baby chicks. In the backyard was a small room containing an incubator and cages for

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1 All statutory references are to the Penal Code unless otherwise stated.

2 Unspecified dates in the statement of facts are to the year 2011.

In this opinion, certain persons are identified by initials in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

chickens. Defendant and J. entered, and defendant showed J. some chicks. J. asked if she could keep one. Defendant unzipped J.'s pants and touched her genitals with his finger under her clothing. He told her not to tell anyone. After, J. opened the door and left the room. She took a chick home with her.

J.'s mother, L., was helping defendant's wife clean up after a yard sale the women had had in defendant's yard. When J. came out of the backyard, she showed L. a chick. J., who loved animals and had asked for a chick more than once, was content, but not as happy as L. would have expected.

Because she was scared and ashamed, J. did not immediately tell anyone what had happened. Eventually, however, she told her cousin, A. A., who was 10 years old at the time of trial, recalled J. telling her during the summer that defendant touched her where he was not supposed to. J. acted sad and scared. A. and L. had known J. to lie sometimes, but never about something serious like this.

J. subsequently talked to the police, but she thought they got some things wrong, such as her saying she opened the door to the incubator room with a hammer. She did not remember everything she told the police, as she forgot "really easily." She only remembered defendant touching her with his finger and did not think there was any other touching. She admitted she was known to tell some lies when she was small, but she stopped lying when she was eight.

The Tulare County Sheriff's Department first received a report of the incident on July 11. On July 21, Laura Boland conducted a CART (Child Advocate Response Team) interview with J. During the interview, a videotape of which was played for the jury, J. said when she went into the room where the chicks were born, defendant asked her if she wanted a chick. She said yes, but he just unzipped her pants and started licking her on the outside of her "private part." He also rubbed his fingers inside her "private part." J. told him to get away and she tried to open the door, but it was locked. Defendant tried to

grab her, but there was a hammer next to her, so she broke the lock with it and pushed the door open and ran home.

Detective Gezzer interviewed defendant on July 25. Gezzer first had a brief conversation to determine whether defendant needed an interpreter. After establishing defendant did not, Gezzer began the interview, a recording of which was played for the jury.

During the interview, defendant stated he was aware of J.'s accusations. He initially admitted giving J. a chick, but denied doing anything improper. He said one of his daughters was with them in the incubator room. Eventually, after Gezzer asked how defendant would explain it if his DNA was found in J.'s underwear, told defendant the last person who did not want to tell the truth received 150 years in prison, and asked why J. would make this up, defendant said, "Well if she said I touched it, well, maybe I did (unintelligible)[.]" Gezzer urged defendant to tell the truth, whereupon defendant replied, "All right. Maybe I did touch it." He said his daughter was in the back and he just touched J. He did not do it in the incubator room; they were outside, in front of the doorway. Nobody saw him. Defendant said he touched J. with his hands underneath her clothing, but he denied licking her or penetrating her with his finger. Defendant said J. unzipped her pants on her own, because she wanted a baby chick. He told her to grab the chick, but that he was going to touch her "right there," and she said "okay."

Defendant said he was very sorry for what he did, and he agreed to write J. a letter of apology. He wrote to J. in Spanish that he regretted touching her, she knew he loved her a lot, and he was sorry.

II

DEFENSE EVIDENCE

On the last day of school, defendant's wife and L. held a yard sale. When defendant's daughters and J. arrived at defendant's house together after riding the school bus home, defendant's daughters showed their mother their grades and some certificates,

but J. threw down her books and ran to the backyard because she wanted to get a chick. One of defendant's daughters went with her, and was in the backyard the entire time J. was back there. Defendant's wife checked on them through the kitchen window every five minutes or so when she went inside to check on her infant, who was asleep.

Defendant arrived home from his job at a cattle ranch about 2:00 p.m. As was his routine, he went directly to the back to feed the chickens and take care of his dogs. J. and defendant's daughter were still in the backyard. Defendant's wife heard them talking and playing, but paid no attention to what they were talking about. She saw nothing that seemed inappropriate. J. came out of the backyard with a baby chick. She was happily skipping and jumping, and immediately came over to show it to L. and defendant's wife.[3]

Defendant's wife found out about the molestation allegations from one of her daughters. She then confronted defendant. Defendant and his wife subsequently had a conversation with J. on their back porch. Only the three of them were present. J. said the allegations against defendant were not true. She refused to say why she had made them.

After the day J. got the baby chick, she continued to visit defendant's house almost every day. She attended a birthday party for one of his daughters on June 6. Defendant's wife had known J. for several years and knew her to tell lies every day. According to defendant's wife, J. lived in an imagination world where she believed everything was possible.

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3 According to defendant's daughter, she and J. were together the entire time. After defendant got home, J. kept begging him for a chick. Defendant went into the incubator room to get the chicken food and J. also went into the room, but defendant's daughter followed them in. They were only in there a few seconds, during which defendant's daughter did not see defendant touch J. When J. got the chick, the girls went to the front yard. J. was happy and excited and skipping. She did not appear to be upset or sad about anything.

Jose Estrella, who had known defendant since high school, and Alberto Chavez, who had known defendant for over 25 years, attested to defendant's reputation for being honest and truthful.

Defendant testified that he only got as far as around 11th grade in school. He had been working since high school. He had never been in trouble with the law as an adult. His arrest on July 25 came as a surprise; he was never told why the police were at his house or why he was being arrested.

Upon his arrest, defendant was taken from Tipton to the main jail in Visalia, and placed in a holding tank around 6:00 or 7:00 p.m. Around 9:00 p.m., he was taken to a small room so he could talk to Gezzer. Gezzer said he was going to record the interview. Before the tape was turned on, however, Gezzer said defendant had better tell him what was going on, or "CPS" was going to take defendant's daughters. Gezzer was yelling and cussing at defendant, who was scared about his girls being taken. Defendant felt threatened by Gezzer. Defendant said he wanted his lawyer, but Gezzer told him, "Quit your bullshit. If you don't tell me the truth, CPS will take your girls away from you."[4] Gezzer then said they were going to start the interview, and the tape was turned on. Although Gezzer had told defendant why he was arrested by that point, defendant did not understand what the allegations were against him until Gezzer told him during the interview. Defendant consistently said he had not done anything. He finally said he touched J. because he was afraid he would go to jail when Gezzer said defendant was going to get 150 years. Defendant thought he would lose his children and never see them or be a free man again. Defendant thought Gezzer would let him go if he said he did it. Defendant did not tell Gezzer the truth when he said he touched J. Defendant never had sexual contact with a little girl. Defendant did not simply agree to everything Gezzer

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4 Gezzer "absolutely den[ied]" defendant's allegations.

represented J. had said, however, because what Gezzer was asking defendant was not true.

Defendant's relationship with his daughters was very good. He felt J. was just like his daughter. On the date of the alleged incident, J. and one of defendant's daughters were in the backyard when defendant got home from work. J. asked defendant for a baby chick. Defendant said no, they were too small, but she could have one of the ones that was running loose in the backyard. J. caught one, and defendant gave her a carton and some food for it. Defendant's daughter never left the backyard when J. was there. Both girls went into the incubator room with defendant. They were only in there a minute or so, and nothing happened between him and J. The incubator room had a deadbolt lock on the inside door, but it did not actually latch. There was no way to lock the door.

DISCUSSION

I

BATSON-WHEELER

Defendant, who is Hispanic, challenges the trial court's denial of his *Batson-Wheeler*[5] motion, which was brought as a result of the prosecutor's peremptory excusals of three Hispanic prospective jurors. Hispanics are a cognizable group for purposes of *Batson-Wheeler* analysis. (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.)

A. Legal Principles

"'The prosecution's use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity, violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I,

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[5] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). *Wheeler* has been overruled in part by *Johnson v. California* (2005) 545 U.S. 162.

section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution.' [Citation.]" (*People v. Trinh* (2014) 59 Cal.4th 216, 240.) "A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] 'The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant].' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 75.)

> "'A prosecutor asked to explain [her] conduct must provide a "'clear and reasonably specific' explanation of [her] 'legitimate reasons' for exercising the challenges." [Citation.] "The justification need not support a challenge for *cause*, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.' [Citation.] '[B]ut race-based decisions are not constitutionally tolerable.' [Citations.]
>
> "Therefore, '[a]t the third stage of the *Wheeler*/*Batson* inquiry, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]' [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 102.)

"On appeal, we review the trial court's determination deferentially, 'examining only whether substantial evidence supports its conclusions. [Citation.]' [Citation.] 'We

presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]" (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 76.)

"'"As part of our analysis, we consider as 'bearing on the trial court's factual finding regarding discriminatory intent' [citation] the comparisons of prospective jurors challenged and unchallenged that defendant expounds in his briefs, though few if any of these comparisons were made in the trial court."'" (*People v. DeHoyos*, *supra*, 57 Cal.4th at p. 103.) "'If a prosecutor's proffered reason for striking a [Hispanic] panelist applies just as well to an otherwise-similar [non-Hispanic] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.' [Citation.]" (*People v. Lomax* (2010) 49 Cal.4th 530, 571-572.) '"'At the same time, 'we are mindful that comparative juror analysis on a cold appellate record has inherent limitations.' [Citation.] In addition to the difficulty of assessing tone, expression and gesture from the written transcript of voir dire, we attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. 'Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding.' [Citation.]" [Citation.]' [Citation.]" (*People v. DeHoyos*, *supra*, at p. 103.) Moreover, "'comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination.' [Citation.] Although we must consider comparative juror analysis evidence raised for the first time

on appeal [citation], our focus is limited to the responses of stricken panelists and seated jurors that have been identified by defendant in his claim of disparate treatment. [Citation.]" (*People v. Lomax*, *supra*, at p. 572.)

With these principles in mind, we examine the circumstances in this case.

B. Factual Background

Prospective Jurors M.B. and J.V. were called early in jury selection, before either party had begun exercising peremptory challenges. All prospective jurors were shown a list of items, such as name and employment, and asked to provide pertinent personal information.

M.B. related he was a machinist, while his wife was a furniture consultant. He had never been a juror and he had no relatives in law enforcement, although he was a medical first responder in his company. He had been charged with assault and sentenced to four years. Asked by the court if it was a felony, M.B. said he believed it was, but he thought it was dropped to a misdemeanor. He regained his citizenship after he paroled, but did not know if he received a pardon. He was eligible to vote and exercised that right. Under questioning by defense counsel, M.B. related he had siblings, a cousin, and an uncle who had been sexually molested or accused of such a crime. M.B. was too young at the time to "acknowledge the whole situation," but he had heard stories through the years. None of his family members had told him how it affected them, and he believed none of it would affect his ability to be fair and impartial.

J.V. related he was a fulltime student. He had no prior jury service, was never involved in a criminal case, and had no legal or medical training. Neither he nor any of his relatives had been involved in law enforcement. Under questioning by the prosecutor, he stated he was studying "[a]uto" at a local college, had just started back to school for his third semester, and was missing class. He was taking three classes and attending fulltime. Asked by the prosecutor if it would be a problem if he was picked for the jury, J.V. said it was "probably going to be a problem" since classes just started that week.

However, he had one instructor who taught all-day classes, so he let that instructor know he would be in court "today."

The prosecutor asked the panel if anyone had children. M.B. had a seven-year-old and a six-year-old. J.V. had no children.

The prosecutor exercised her first peremptory challenge against M.B. She exercised one more challenge, then passed three times with Hispanics in the box.

J.H. was among the next group of prospective jurors called for questioning. Prospective jurors were allowed to ask to go back into a jury room if they were asked a question they would rather answer in a more private setting. J.H. asked if he could do so. Once in the jury room, J.H. stated he worked for the Department of Corrections as a teacher, and had two relatives who had been victims of molestation or sexual assault. In open court, he stated he had several friends in law enforcement. He also clarified that although he taught at the Department of Corrections, he did not have peace officer status. Under questioning by defense counsel, J.H. stated he worked with inmates who were adult basic education and GED students, and he occasionally had contact with inmates who had been convicted of sex crimes. In response to the prosecutor's question, he stated he had no children.

The prosecutor used her third and fourth peremptory challenges to excuse J.V. and J.H., respectively. Defense counsel made a *Batson-Wheeler* motion on the ground the prosecutor had used three of her four peremptory challenges to excuse Hispanic males who, counsel represented, were roughly defendant's age. The trial court found a prima facie case and asked the prosecutor to give her reasons for the excusals. This ensued:

> "[PROSECUTOR]: Sure. On [M.B.], I was concerned because he says that he had gone to prison for a violent crime, assault, and also that he had family members that were molested and then also accused. So I had concerns based on that for his bias and also about his prior criminal conduct, that concerned me greatly.

"[J.V.], I was concerned about him mostly because he really doesn't have any experience. He's a student. He's not married. Doesn't have any children. He doesn't have a career. He also was in the back, I noticed he was just sitting there kind of frowning a lot and didn't seem to — to me, to be really paying attention. My biggest concern is that he didn't have really any live [*sic*] experience to lend to this jury panel.

"And then as far as [J.H.] goes, you know, I thought that it was weird that he came back into the jury room to kind of go through the list of questions for us. It seemed like he was confused and not understanding what was going on in the process because he just came back and started telling us his occupation and everything.

"And also, I have concerns about people who work for [the Department of Corrections] in some instances, especially in this case, he works with the inmates as a teacher, he's not in law enforcement, and that he might compare maybe some of the inmates that he has dealings with to the defendant in this case. [¶] … [¶]

"[DEFENSE COUNSEL]: [J.H.], … when we went back into the jury room actually told about two people in his life, niece and his mother, that were victims of sexual crimes. I think that was the major reason why he went back there. So this excuse of saying he seemed to be confused by the process —

"THE COURT: Oh, I think he was confused. I got the same impression.

"[DEFENSE COUNSEL]: Huh?

"THE COURT: I got the same impression. I thought he had difficulty even articulating how he felt. I was surprised he was a teacher.

"In any event, I don't find that her reasons were in any way based upon race or ethnicity and that they were race neutral reasons, especially [M.B.] with his background.

"[DEFENSE COUNSEL]: Well, I … understand the prosecution's concerns about somebody who's been convicted of a crime, but, I mean, if he was convicted of a felony, he couldn't be sitting here as a juror so obviously he didn't have a felony.

"THE COURT: A felony, misdemeanor, it didn't seem like —

"[DEFENSE COUNSEL]: He didn't go to prison — he did use the word parole, but I doubt that he was paroled. A lot of people say that when they get put on probation.… [¶] … [¶]

"THE COURT: I don't see the difference. If it was a misdemeanor or a felony, he has a criminal conviction. He said he did four years, is what I thought he said.

"[PROSECUTOR]: That's what I heard. [¶] … [¶]

"[DEFENSE COUNSEL]: Well, I heard him say that, but then he basically — he's sitting here as a juror. He couldn't be — have done four years and he says he votes. He couldn't be voting if he's a convicted felon.

"THE COURT: That's fine. That's why I asked him.

"[DEFENSE COUNSEL]: That's why it's — obviously he might be confused by his own background. You know, and ultimately it sounds like he had a misdemeanor. And then you even asked him, you asked him if he got a governor's pardon so —

"THE COURT: So, in any event, I don't find that —

"[DEFENSE COUNSEL]: Well, I mean, the [M.B.] one, I … will defer to the Court ruling on that. But the other two I think are really not legitimate reasons, and I … think they are based on race. So I at least have made my record.

"THE COURT: [J.V.] did not seem like he was very, let's say, attuned to what was going on.

"[DEFENSE COUNSEL]: Oh, I have a different opinion. I thought he was attentive. I was watching him. He looked like he was very attentive. He indicated he was a student …. I mean, students are going to be more attentive. I think they're fascinated by any new process they get a chance to be involved in, and he was sitting there alert. He was — for a long period of time he sat in the front row before he got put in the back. And he was sitting there alert. You know, and now she says when he was in the back, he seemed to be dosing [*sic*] off. I didn't see that at all.

"THE COURT: I did.

"[DEFENSE COUNSEL]: Huh?

"THE COURT: I did.

"[DEFENSE COUNSEL]: But a student you know —

"THE COURT: Okay.

"[DEFENSE COUNSEL]: The only thing that he said, and this might be worthy, is … he had some concerns because he's taking classes and —

"THE COURT: Auto classes I believe.

"[DEFENSE COUNSEL]: Well, no, you know, being on jury duty could interfere with his classes —

"[PROSECUTOR]: Yeah. [¶] … [¶]

"THE COURT: He didn't say that, but I saw him not really, as I said, connected with what was going on here.… And the motion is denied."

Defendant subsequently raised the trial court's *Batson-Wheeler* ruling as one of the grounds for his motion for a new trial. The motion was denied.

C. Analysis

The only contested issue before us is the trial court's finding with respect to the third stage of the *Batson-Wheeler* analysis. The record clearly establishes the trial court made a "sincere and reasoned effort to evaluate each of the [prosecutor's] stated reasons for a challenge to a particular juror" (*People v. Jurado* (2006) 38 Cal.4th 72, 104), and substantial evidence supports the court's ruling.

With respect to M.B., the prosecutor gave as reasons his conviction for a violent crime, and the fact he had family members who had been molested and accused of such a crime. All are accepted, race-neutral reasons for excusals. (See, e.g., *People v. McKinzie* (2012) 54 Cal.4th 1302, 1321; *People v. Lomax*, *supra*, 49 Cal.4th at p. 573; *People v. Cruz* (2008) 44 Cal.4th 636, 655-656, fn. 3.) They were inherently plausible and supported by the record. (See *People v. Silva* (2001) 25 Cal.4th 345, 386.)

With respect to J.V., the prosecutor pointed to his lack of life experience and the fact he did not seem to be paying attention. Youth and a concomitant limited life

experience are valid bases for excusal (*People v. Gonzales* (2008) 165 Cal.App.4th 620, 631; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328), and again were inherently plausible and supported by the record. The prosecutor's demeanor-based reason was neither affirmatively contradicted by the record nor inherently improbable (see *People v. Reynoso* (2003) 31 Cal.4th 903, 925-926; *People v. Jordan* (2006) 146 Cal.App.4th 232, 256), and in fact was confirmed by the trial court (cf. *Snyder v. Louisiana* (2008) 552 U.S. 472, 479). Generally speaking, a prospective juror's demeanor may properly be considered by a prosecutor in deciding whether to exercise a peremptory challenge. (See, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 202; *People v. Turner* (1994) 8 Cal.4th 137, 170-171, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282.) The trial court here was in the best position to observe J.V., and its acceptance of the prosecutor's reasons is entitled to great deference. (*People v. Stanley* (2006) 39 Cal.4th 913, 939; cf. *People v. Long* (2010) 189 Cal.App.4th 826, 847-848.)[6] Under the circumstances, the fact defense counsel did not observe something, or interpreted it differently than the prosecutor, does not call into question the credibility of the prosecutor's stated reason. (*People v. Jordan*, *supra*, 146 Cal.App.4th at p. 255.) Moreover, the trial court was in the best position to observe the *prosecutor's* demeanor, and the manner in which she exercised her peremptory

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6 Defendant asserts the trial court's finding is "unreliable," since the court erroneously indicated J.V. did not say being on jury duty would interfere with his classes. We do not find any misstatement by the court in this regard sufficient to call into question its memory of J.V.'s demeanor. We also reject defendant's assertion the prosecutor's failure to question J.V. on the purported reason for dismissal makes the reason "'implausible.'" As defendant notes, the prosecutor did not cite the potential problem with missing classes as a reason for dismissing J.V. Rather, it was defense counsel who proffered that observation. Since the prosecutor did not rely on, and the trial court did not use, the issue of J.V.'s classes as a reason for excusing him, the prosecutor's failure to question J.V. on that issue is immaterial. (See *People v. DeHoyos*, *supra*, 57 Cal.4th at p. 106, fn. 4.)

challenges, in assessing the prosecutor's credibility. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 939; see *People v. Lomax*, *supra*, 49 Cal.4th at pp. 570-571.)

With respect to J.H., the prosecutor cited J.H.'s apparent confusion and her concern about people who work for the Department of Corrections, especially in a case such as this where the prospective juror worked with inmates as a teacher. Again, the demeanor-based reason was confirmed by the trial court, and was neither affirmatively contradicted by the record (contrary to defendant's argument on appeal) nor inherently improbable. The prosecutor's concern about J.H.'s employment was also a valid reason that was inherently plausible and supported by the record. (See *People v. Jones* (2013) 57 Cal.4th 899, 919; *People v. Reynoso*, *supra*, 31 Cal.4th at pp. 924-925.)

We find nothing in the record to contradict the trial court's implicit finding the prosecutor's offered justifications for the excusals were credible, and the reasons she gave genuinely motivated her peremptory challenges and were not merely pretexts for purposeful discrimination. (See, e.g., *People v. Hamilton* (2009) 45 Cal.4th 863, 907; *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *People v. Hall* (1983) 35 Cal.3d 161, 167-168.) Defendant disagrees based on the prosecutor's purported lack of meaningful voir dire on the subjects of concern, and a comparison of the prospective jurors excused by the prosecutor with other individuals who served on defendant's trial jury.

It is true a prosecutor's failure to engage in meaningful voir dire on a subject he or she says is one of concern, may suggest the explanation is a sham and a pretext for discrimination. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246; but see *People v. Taylor* (2010) 48 Cal.4th 574, 615.) Here, however, all prospective jurors were asked to provide certain information that included the prosecutor's areas of concern, and defense counsel engaged in fairly extensive questioning in many of the areas. Given the time limits imposed by the court on voir dire by counsel, the prosecutor reasonably could have believed additional examination would add little or nothing to the prospective jurors' answers and would not have changed their demeanor. (See *People v. Lewis* (2008) 43

Cal.4th 415, 477, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920.)

We have undertaken the requisite comparative analysis of M.B., J.V., J.H., and the seated jurors identified by defendant on appeal. (See *People v. Cruz, supra*, 44 Cal.4th at p. 659, fn. 5; *People v. Lenix* (2008) 44 Cal.4th 602, 607, 621-622, 624.) "Viewing such comparative evidence in light of the totality of evidence relevant on the claim, we conclude it does not demonstrate purposeful discrimination." (*People v. Cruz, supra*, 44 Cal.4th at p. 659.)

With respect to M.B., defendant points to the fact the prosecutor did not excuse Juror No. 1484810, despite the fact that juror's husband had been charged with, and "served some time" for, theft some nine years earlier. However, we perceive a significant difference between the potential bias of a prospective juror who — by his own admission — personally suffered a conviction for a "[v]iolent crime" and one whose husband pled no contest to a property crime such as theft.

Moreover, the prosecutor also cited the fact M.B. had relatives who had been molested and accused of such a crime. The same circumstances did not exist with respect to Juror No. 1484810. "In order for a comparison to be probative, jurors need not be identical in all respects [citation], but they must be materially similar in the respects significant to the prosecutor's stated bas[e]s for the challenge." (*People v. DeHoyos, supra*, 57 Cal.4th at p. 107.) "Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so." (*People v. Lenix, supra*, 44 Cal.4th at p. 631, fn. omitted.) The combination of factors reasonably could have caused the prosecutor to distinguish between M.B. and Juror No. 1484810. (See *People v. Cox* (2010) 187 Cal.App.4th 337, 359.) Defendant observes that the prosecutor did not excuse Juror No. 1443154, despite the fact that juror's sister informed her, less than a year earlier, that she was molested by a neighbor 40 years ago, but again, the fact a family member was a victim of molestation was merely one of the circumstances the

prosecutor cited with respect to M.B. M.B.'s combination of circumstances are not materially similar to those of the seated jurors.

With respect to the prosecutor's excusal of J.V. based in part on lack of life experience, defendant points to Juror No. 1443154, who worked at a church, and Juror No. 1113180, who had been a stay-at-home mother for the four years preceding trial. Defendant surmises these jurors "arguably" had more limited life experience than J.V., but his speculation is not supported by the record. Juror No. 1113180 had received medical training as a "CNA" 10 years earlier, and had previously served on a jury. She also had three children, ages seven, four, and two. Juror No. 1443154 was presently employed, married, and the parent of three adult children and two grandchildren.

As to J.H., defendant finds it "interesting" the prosecutor did not cite the fact J.H. had family members who were victims of sexual misconduct as a reason for his excusal, while using that fact as a basis for excusing M.B. However, the relevance of comparing two prospective jurors who both were challenged by the prosecutor is "questionable." (*People v. Lomax*, *supra*, 49 Cal.4th at p. 571, fn. 14.) As previously observed, in any event, M.B. — unlike J.H. — also had family members accused of molestation or similar crimes. Defendant also says the prosecutor did not ask J.H. about the possibility he might compare some of the inmates he taught with defendant, even though Juror No. 1484810 would have been more likely to identify with an accused because her husband served time for a crime. Again, however, we consider the combination of factors, and Juror No. 1484810 did not display any of the confusion or inarticulateness both the prosecutor and trial court found apparent with respect to J.H.

Our review of the record as a whole demonstrates that substantial evidence supports the trial court's conclusion the prosecutor's peremptory excusals of M.B., J.V., and J.H. were not motivated by discriminatory intent. (See *People v. Cruz*, *supra*, 44 Cal.4th at p. 661.) The *Batson-Wheeler* motion, and new trial motion based thereon, were properly denied.

II

DEFENDANT'S INCULPATORY STATEMENT

Defendant contends his admission to Gezzer that he improperly touched J. was erroneously admitted into evidence. He says the statement was taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), because Gezzer improperly dissuaded him from refusing to waive his right to counsel. Because the statement's wrongful admission at trial cannot be declared harmless beyond a reasonable doubt, he says, reversal of his conviction is required.

A. Background

Prior to trial, defendant moved to suppress his statement on the grounds he was questioned after he asked to have an attorney present during questioning, thereby violating *Miranda*, and the statement was involuntary. The People contended defendant's statements about a lawyer were ambiguous, so Gezzer properly asked for clarification. The People also asserted defendant's statement to Gezzer was made voluntarily.

An Evidence Code section 402 hearing was held. A recording of the interview was played; the trial court considered it, and used both parties' transcriptions (which contained minor differences) as aids in listening to it.[7] The recording revealed that at the outset of the interview, Gezzer obtained defendant's date of birth and age, stated defendant was arrested for lewd and lascivious acts on an eight-year-old girl who lived down the street, and gave the date and time of the interview. Gezzer asked if defendant communicated well in English; defendant replied, "Yes." Gezzer told defendant if at any

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[7] We also have viewed the video recording and read both transcriptions. Differences between the two do not affect our analysis of defendant's claim on appeal. Accordingly, we quote from the People's version, with spelling, punctuation, and grammar as in the original, and set out some of the transcription differences in footnotes.

time he did not quite understand what Gezzer was asking, to just say so. Defendant agreed. This ensued:

> "[Gezzer]: All right. So, you have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any question if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> "[Defendant]: Okay.
>
> "[Gezzer]: Do you understand your rights?
>
> "[Defendant]: Yes, Sir.
>
> "[Gezzer]: And in with these rights in mind, ah, is it okay to talk to me or do you, or are, are you okay with talkin' to me about, about, what your accused of?
>
> "[Defendant]: Well, okay, I think probably get my lawyer 'cause, you know, they this is a serious case.[8]
>
> "[Gezzer]: Okay. Um, you gotta make that call. You make that decision entirely on your own. Are you saying you want a lawyer or you just thinking about it at this point?
>
> "[Defendant]: Ah, probably get a lawyer 'cause you know this is some serious stuff right here.[9]
>
> "[Gezzer]: Yeah it's serious stuff.
>
> "[Defendant]: Yeah. (unintelligible)
>
> "[Gezzer]: Okay, so you, um, I guess what I'm tryin' to (unintelligible) is I just want you to make yourself clear because you only

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8 Defendant's transcription reads: "Well, I probably get my lawyer because this is serious case."

9 Defendant's transcription reads: "I'll probably get a lawyer cause, you know, this is serious stuff here."

get one opportunity to give your side of the story about what had taken place, and she gave us her side of the story.

"[Defendant]: Okay.

"[Gezzer]: So …

"[Defendant]: … I could, I could say my side of the story right now or?[10]

"[Gezzer]: Well that's entirely up to you. That's why, that's why we read the rights. You, you cannot tell your story if you don't want to, but here's what happens-

"[Defendant]: Oh, okay.

"[Gezzer]: If you don't tell your story then we proceed forward and you may never get that chance again.

"[Defendant]: Okay, I could just say my side of the story.[11]

"[Gezzer]: If, if you want to go with the lawyer thing then you can do that to, that's entirely up to you. It makes no difference to me at all.

"[Defendant]: Okay, Sir.

"[Gezzer]: Okay, so which way would you rather go?

"[Defendant]: Well, I just say a side of my story right now.[12]

"[Gezzer]: Okay, all right. Tell me your side of the story.…"

At the hearing, defendant's wife testified defendant was 41 years old and had had little or no dealings with law enforcement officers, as far as she knew. To her knowledge, he did not have a high school diploma. His native language was Spanish,

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10 Defendant's transcription reads: "I say my side of the story right now? Or[.]"

11 Defendant's transcription reads: "Ok, I'll just say my side of the story[.]"

12 Defendant's transcription reads: "Well, I just say my side of the story, you know?"

which was spoken in their household; defendant did not understand technical English words.

Gezzer also testified at the hearing. There was no discussion between defendant and him about the case before the recorder was turned on. Defendant seemed to communicate well; Gezzer understood what defendant was saying and felt defendant understood what Gezzer was saying, although Gezzer did question defendant about this at the beginning of the interview, prior to reading him his rights. Gezzer asked defendant if he communicated well in English and Spanish, and defendant said he did communicate well in both languages. Gezzer told defendant to speak up if he had difficulty understanding.

Gezzer denied telling defendant to "quit this bullshit." His telling defendant he only got one opportunity to give his side of the story was merely an investigative technique. It was the truth as far as Gezzer was concerned; it was the only opportunity defendant was going to have to tell Gezzer his story, because once Gezzer left, he would not be returning.

Gezzer admitted he fabricated the DNA about which he spoke to defendant during the interview. Lying to a defendant in order to get him to open up was a technique Gezzer sometimes used.

Defendant testified at the hearing that he only finished 11th grade, and his native language was Spanish, although he had been in the United States since he was five years old. When he got to the interview room, Gezzer asked if defendant knew why he was there. When defendant asked why, Gezzer said because of J.'s statement. Gezzer started to read defendant his rights. Defendant said, "I want my attorney," and Gezzer "jumped back." Gezzer said he (Gezzer) was pushy and had 25 years of experience doing cases like this, and he told defendant to "quit [defendant's] bullshit." Gezzer started telling defendant that this was the last time defendant was going to talk to Gezzer. Gezzer was talking as though he was mad. This all took place before Gezzer began recording.

Defendant only understood some of what Gezzer told him. He did not tell Gezzer, however, because defendant was a nervous person and got nervous. Defendant confessed to touching J. because Gezzer scared him when he said defendant was going to be given over 100 years. Defendant's nerves made defendant falsely confess. Defendant did not go along with Gezzer's version of what happened, because defendant did not do anything. Defendant admitted touching J. so Gezzer would leave him alone. Defendant no longer wanted to hear anything Gezzer had to say.

At the conclusion of the hearing, defense counsel argued defendant twice said he probably would get a lawyer, yet Gezzer — instead of merely clarifying — employed a technique of telling defendant he had only one chance to tell his side of the story, even though that was not the state of the law. Counsel argued that defendant's saying maybe he should get a lawyer, coupled with Gezzer's incorrectly telling him that he would only be able to tell his story once, resulted in a waiver that was neither intelligent nor voluntary. Counsel also argued Gezzer coerced defendant's statement by saying that unless defendant told him the truth, defendant would get 150 years in prison.

The prosecutor responded that defendant's request for an attorney was equivocal, and that defendant's statement about what purportedly happened before the recording was turned on was unreliable. The prosecutor further argued that, based on the totality of the circumstances, defendant's free will was not overcome. Although defendant made an admission when confronted with purported DNA, he still had the presence of mind to give only a snippet.

The court gave its ruling in open court a few days after the hearing. It confirmed with defense counsel that the request was to exclude defendant's statement on two grounds: *Miranda* violation and coercion. It denied the motion on both grounds. The court found that, under the applicable objective standard, defendant did not unambiguously invoke his right to counsel. Gezzer followed up with some clarifying questions, then defendant agreed to talk. The court expressly stated it did not accept as

factual defendant's testimony that he invoked before any recording began. The court made the further factual finding that defendant seemed to fully understand the conversation he was having with Gezzer during the interrogation, and that at no time did he indicate in any way that he did not understand what was happening or any of Gezzer's questions. The court rejected the claim of coercion, finding Gezzer never stated *this* defendant was going to receive over 100 years in jail, and nothing else said by Gezzer was coercive.

As a result of the court's ruling, defense counsel asked for, and was granted, a continuance of trial. Defendant subsequently retained new counsel, who filed an in limine motion to exclude defendant's statement based on a *Miranda* violation. The motion was denied, as the court had already ruled on the issue.

As previously described in the statement of facts, a recording of defendant's statement was played for the jury. Defendant subsequently moved for a new trial in part based on admission of that evidence. The trial court denied the motion, finding again that defendant's reference to counsel was ambiguous and Gezzer cleared up the ambiguity.

B. <u>Analysis</u>

"Pursuant to *Miranda, supra*, 384 U.S. 436, 'a suspect [may] not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel.' [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) "'The waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" [citation], and knowing in the sense that it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." [Citation.]' [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1086.) "The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence. [Citation.]" (*People v. Dykes, supra*, 46 Cal.4th at p. 751.)

> "[A] suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases.… [The California Supreme Court has] recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.] A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.] In contrast, an unambiguous request for counsel or a refusal to talk bars further questioning. [Citation.]
>
> "Although there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.]" (*People v. Cruz*, *supra*, 44 Cal.4th at pp. 667-668.)

"In reviewing a trial court's *Miranda* ruling, we accept the court's resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence, and we independently determine, from the undisputed facts and facts properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) Because the facts surrounding an admission or confession are undisputed to the extent the interview is recorded, the issue — including whether the defendant's purported request for counsel was ambiguous or equivocal — is subject to our independent review. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176-1177; *People v. Bacon*, *supra*, 50 Cal.4th at p. 1105.)[13]

We first examine the adequacy of the *Miranda* warnings given defendant.[14] *Miranda* requires that, prior to any custodial questioning, "the person must be warned

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13 The same legal principles apply regardless of whether a particular statement constitutes a confession or an admission. (*Miranda*, *supra*, 384 U.S. at p. 476; *People v. Belmontes* (1988) 45 Cal.3d 744, 773, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

14 We asked the parties for supplemental briefing on several issues arising from Gezzer's references to defendant only getting one opportunity to give his side of the story and possibly never getting the chance again, and whether those comments rendered the *Miranda* advisement inadequate.

that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda, supra,* 384 U.S. at p. 444.) The warnings need not, however, "be given in the exact form described in that decision." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 202 (*Duckworth*). So long as they "touch[] all of the bases required by *Miranda*," they are adequate. (*Id*. at p. 203.)

Defendant concedes Gezzer sufficiently admonished him of his *Miranda* rights. Defendant answered affirmatively when Gezzer asked if he understood those rights. Absent any other circumstances, defendant's stating, "I just say a side of my story right now" or "Well, I just say my side of the story," and then making a statement and answering questions, would constitute a valid waiver. (See, e.g., *Berghuis v. Thompkins* (2010) 560 U.S. 370, 384; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1269 (*Gonzales*); *People v. Lessie* (2010) 47 Cal.4th 1152, 1169; *People v. Davis* (2009) 46 Cal.4th 539, 585.) Defendant contends, however, that when he told Gezzer "I think probably get my lawyer" and "Ah, probably get a lawyer," he was clearly indicating his desire to speak to a lawyer rather than waive his rights and talk to the detective.

Because defendant's references to a lawyer occurred at the beginning of questioning, the rules regarding prewaiver invocation of the right to counsel apply. (*People v. Duff* (2014) 58 Cal.4th 527, 553 (*Duff*).) In *People v. Williams* (2010) 49 Cal.4th 405, 427-429, the California Supreme Court explained those rules:

> "The question whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, *subsequent* to a valid waiver, he or she effectively has invoked the right to counsel. [Citations.] It is settled that in the latter circumstance, after a knowing and voluntary waiver, interrogation may proceed 'until and unless the suspect *clearly* requests an attorney.' [Citation.] Indeed, officers may, but are *not required* to, seek clarification of ambiguous responses before continuing substantive interrogation. [Citation.]

"With respect to an initial waiver, however, '[a] valid waiver need not be of predetermined *form*, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision.' [Citations.]

"This court has recognized that 'when a suspect under interrogation makes an ambiguous statement that could be construed as an invocation of his or her *Miranda* rights, "the interrogators may *clarify* the suspect's comprehension of, and desire to invoke or waive, the *Miranda* rights."' [Citations.]

"Whereas the question whether a waiver is knowing and voluntary is directed at an evaluation of the defendant's state of mind, the question of ambiguity in an asserted invocation must include a consideration of the communicative aspect of the invocation — what would a *listener* understand to be the defendant's meaning. The high court has explained — in the context of a postwaiver invocation — that this is an objective inquiry, identifying as ambiguous or equivocal those responses that 'a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect *might* be invoking the right to counsel.' [Citations.] This objective inquiry is consistent with our prior decisions rendered in the context of analyzing whether an assertion of rights at the initial admonition stage was ambiguous. [Citation.] We note that a similar objective approach has been applied by the United States Court of Appeals for the Ninth Circuit to identify ambiguity in a defendant's response to a *Miranda* admonition; a response that is reasonably open to more than one interpretation is ambiguous, and officers may seek clarification. [Citation.]

"In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends. In those instances, the protective purpose of the *Miranda* rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant."

Viewed under the applicable objective standard, defendant's references to a lawyer — even considering their context, that they were repeated, and that defendant spoke English as a second language — were ambiguous and equivocal. (Compare *Davis v. United States* (1994) 512 U.S. 452, 455, 459, 461-462 ["'Maybe I should talk to a lawyer'" was not unambiguous or unequivocal request for counsel]; *People v. McCurdy*,

supra, 59 Cal.4th at pp. 1081, 1087 ["'They always tell you get a lawyer.… I don't know why'" did not constitute unambiguous invocation of right to counsel]; *Duff*, *supra*, 58 Cal.4th at pp. 552, 553, 554 ["'I don't know. Sometimes they say it's — it's better if I have a — a lawyer'" was at most equivocal invocation of right to counsel]; *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 216, 219 ["'If you can bring me a lawyer, that way I[,] I with who … that way I can tell you everything that I know and everything that I need to tell you and someone to represent me'" was not clear invocation of right to counsel]; *People v. Bacon*, *supra*, 50 Cal.4th at p. 1105 ["'I think it'd probably be a good idea for me to get an attorney'" contained several ambiguous qualifying words and so was not sufficiently clear invocation of right to counsel that questioning had to cease]; *People v. Martinez* (2010) 47 Cal.4th 911, 945, 951 ["'I don't want to talk anymore right now'" was not clear refusal to waive right to silence that barred resumption of questioning later that day]; *People v. Stitely* (2005) 35 Cal.4th 514, 534, 535, italics omitted ["'Okay. I'll tell you. I think it's about time for me to stop talking'" did not constitute unambiguous assertion of right to silence or counsel]; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1065, 1071 & cases cited ["'I think I would like to talk to a lawyer'" did not constitute unambiguous and unequivocal request for counsel] with *Smith v. Illinois* (1984) 469 U.S. 91, 93, 98-99, italics omitted ["'Uh, yeah. I'd like to do that,'" in response to question whether defendant understood he had a right to consult with lawyer and to have lawyer present during questioning, was unambiguous invocation of right to counsel]; *People v. Gamache* (2010) 48 Cal.4th 347, 383, 385 ["'OK, I do think before I take the polygraph I would like to talk to an attorney and just make sure.… I'd like to know what is going on before I answer any more questions'" was unequivocal invocation of right to counsel]; *People v. Peracchi* (2001) 86 Cal.App.4th 353, 358-359, 361 [""'At this point, I don't think I can talk." [¶] … [¶] … "I guess I don't want to discuss it right now." [¶] … [¶] "I don't want to discuss it right now,"'" while possibly ambiguous initially, ultimately clearly indicated intent to invoke right to remain silent];

Alvarez v. Gomez (9th Cir. 1999) 185 F.3d 995, 998 [defendant's three questions — "'Can I get an attorney right now, man?'" "'You can have attorney right now?'" and "'Well, like right now you got one?'" considered together, constituted unequivocal request for attorney].)

Given the ambiguity, Gezzer was entitled to attempt to clarify defendant's intent and desire to waive his *Miranda* rights. (*Duff, supra*, 58 Cal.4th at p. 553.)[15] Pointing to Gezzer's statements, "[Y]ou only get one opportunity to give your side of the story" and "If you don't tell your story then we proceed forward and you may never get that chance again," defendant claims Gezzer went too far, and instead of merely asking a limited number of clarifying questions, improperly persuaded defendant to waive his rights.[16]

We disagree. When the entire exchange is considered, including Gezzer's telling defendant it was entirely up to defendant whether to tell his side of the story right then or

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15 The Ninth Circuit Court of Appeals *requires* clarification. (*U.S. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1080.) Of course, that court's cases are not binding on us, even on federal questions. (*People v. McCoy* (2005) 133 Cal.App.4th 974, 982.) The analysis and result in the present case are the same whether Gezzer was merely permitted to clarify or was required to do so. (See *Duff, supra*, 58 Cal.4th at pp. 553-554.)

We also note that permissible clarification includes providing the suspect with "any relevant information" that might help him or her decide whether he or she might prefer to wait until an attorney can be provided. (*People v. Sauceda-Contreras, supra*, 55 Cal.4th at pp. 220-221 & fn. 4.)

16 The parties disagree whether defendant sufficiently asserted this claim in the trial court so as to preserve it for appeal. (See, e.g., *People v. Linton, supra*, 56 Cal.4th at p. 1166; *People v. Tully* (2012) 54 Cal.4th 952, 992; *People v. Michaels* (2002) 28 Cal.4th 486, 511-512.) It appears defense counsel at least touched on the subject when, in relation to the new trial motion, he argued Gezzer did not merely ask clarifying questions, but "seduc[ed]" defendant to continue talking. In any event, since defendant has claimed any failure to preserve the issue constituted ineffective assistance of counsel, and we agree with him there could be no logical tactical reason for counsel to seek suppression/exclusion of defendant's statements on the grounds he did raise without also raising this one (cf. *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366), we address the claim on the merits.

whether to "go with the lawyer thing," and that it made no difference to Gezzer, it is clear Gezzer was not "badgering" defendant into waiving his rights (see *People v. Sauceda-Contreras*, *supra*, 55 Cal.4th at p. 220; *People v. Williams*, *supra,* 49 Cal.4th at p. 429), but was seeking clarification of defendant's intent (see *People v. Bacon*, *supra*, 50 Cal.4th at p. 1107 [rejecting claim officer's comment, after defendant said he thought it would probably be a good idea for him to get an attorney, "'I mean I'm, I'm giving you the opportunity to talk'" went beyond asking for clarification to actively dissuading defendant from consulting counsel]).

Duff is highly instructive. In that case, Detective Winfield advised Duff of his *Miranda* rights at the outset of questioning. Duff replied that he understood them, but, asked if he still wanted to talk with Winfield, replied, "'I don't know. Sometimes they say it's — it's better if I have a — a lawyer.'" (*Duff*, *supra*, 58 Cal.4th at p. 552.) Winfield responded: "'You know, sometimes they do. Yeah. Yeah. You know, but sometimes — uh — *a lot of times people want to talk and* — and want to — uh — *clarify, let's say for instance* — um — *where they were during that period of time. Because, really, you could provide me — and it's entirely up to you. It's — it really is. You can provide me with individuals who could verify where you were that I wouldn't otherwise get.* You know what I mean? And *so that's*— um — that's kind of — uh — you know, the way it — the — *the way it works*. And in — *in most cases, the individuals that I talk to do, in fact, give me* — um — *other circumstances for me to go and check out*. That's why one person's interview leads to another person's, and another's, and another's, and we end up, you know, doing a lot of interviews. *So that's why I told you* I've all — I've — *I have already spoken with quite a few people*. And that's what, eventually, you know, led us to trying to talk to you.'" (*Ibid*., italics added.) Winfield then informed Duff that if at any time he wanted to stop the interview, he had that option. Duff stated he understood, whereupon Winfield asked if he was willing to talk to her about where he was and the like. He answered affirmatively, and she again reminded

him to keep his rights in mind and tell her if at some point he did not feel like answering another question. (*Id*. at pp. 552-553.)

The California Supreme Court rejected the notion any *Miranda* violation occurred, even assuming Duff's remark was an equivocal invocation of his right to counsel and the detective was obligated to clarify his desire to waive his rights before proceeding with the interrogation. (*Duff, supra*, 58 Cal.4th at p. 554.) The high court found the detective did so, and "agree[d] with the trial court that Detective Winfield was not under a legal obligation to follow any particular script in ascertaining Duff's desires; she did not badger Duff but instead lawfully 'proceeded to talk to him to see whether or not he wanted to talk without having to ask him specifically to clarify his ambiguous statement any more than he did by continuing to talk.' [Citation.]" (*Ibid*.)

We find no meaningful difference between the italicized portions of Winfield's statement to Duff and the challenged portions of Gezzer's statements to defendant. Defendant claims, however, that his waiver was not knowing and intelligent, because he did not understand the rights being abandoned or the consequences of abandoning them. He says he incorrectly believed he could simply give his side of the story, as opposed to being subjected to an interrogation, and that he only had one opportunity to do so.

A suspect's waiver of his or her constitutional rights may be vitiated if the *Miranda* advisements given were inadequate or misleading. (See *Duckworth, supra*, 492 U.S. at pp. 200-201, 204-205.) The advisements given here were neither. Indeed, they were clear, accurate, and complete. The question thus becomes whether, in light of the accurate and unambiguous warning defendant was given, Gezzer's statements, made in the context of an attempt to clarify whether defendant was invoking his rights, somehow abrogated defendant's waiver of those rights. We conclude they did not.

It is undisputed that Gezzer informed defendant of his rights under *Miranda* — including that anything he said could and would be used against him in a court of law — and asked if defendant understood his rights, and defendant answered affirmatively.

Gezzer also confirmed defendant communicated well in English, and that defendant knew he could say so if at any time he did not understand what Gezzer was asking.

"… *Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) However, the United States Supreme Court has "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. [Citations.] *Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law*." (*Id*. at pp. 422-423, italics added, fn. omitted.)

The record establishes by the requisite preponderance of the evidence that defendant's waiver of his *Miranda* rights was freely and voluntarily given and was, accordingly, valid. (See *Duff*, *supra*, 58 Cal.4th at p. 551; *People v. Sauceda-Contreras*, *supra*, 55 Cal.4th at p. 220.) With respect to the claim defendant thought he could simply give a statement rather than being interrogated, that is essentially what he did during the first portion of the interview. Moreover, Gezzer's advisement of *Miranda* rights — which defendant stated he understood — expressly referred to defendant "being questioned."

Defendant contends Gezzer's statements ("… I just want you to make yourself clear because you only get one opportunity to give your side of the story about what had taken place, and she gave us her side of the story. [¶] … [¶] … You, you cannot tell your story if you don't want to, but here's what happens- [¶] … [¶] … If you don't tell your story then we proceed forward and you may never get that chance again.") were inaccurate, misleading, and manipulative. We are not persuaded they invalidated defendant's waiver of his rights. Even if they were technically inaccurate under the law, as a practical matter they accurately conveyed what was most likely to happen going forward.[17] Thus, "the practical impact of [the statements] was neither coercive nor deceptive." (*Gonzales, supra*, 54 Cal.4th at p. 1270.)

Gonzales is instructive. In that case, a child was killed while in the care of defendant and Veronica. (*Gonzales, supra*, 54 Cal.4th at p. 1242.) A detective asked if the defendant wanted to give his side of the story. The detective said he had already spoken to Veronica, and her statement would be compared to defendant's statement in court. He again asked if the defendant wanted to tell what happened, and the defendant proceeded to give a statement. (*Id*. at pp. 1268-1269.) On appeal, the defendant argued no waiver of rights should be found, because the detective misled him by saying Veronica's statement would be used against him in court. (*Id*. at p. 1270.) The California Supreme Court rejected the claim, stating: "[W]e are satisfied that the waiver here was 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' [Citation.] Insofar as it was inaccurate for the detective to tell defendant that Veronica's statement would be admissible against him, the practical impact of that statement was neither coercive nor deceptive. It was

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17 Although an attorney representing defendant *could* permit defendant to give a statement to police, it is highly unlike one *would* do so, particularly in face of J.'s allegations.

certainly the case that defendant's and Veronica's statements would be closely compared during the investigation of the crime. The detective's point was that it was in defendant's interest to give his side of the story. Defendant chose to do so, with a full understanding of the nature of his *Miranda* rights and the consequences of abandoning them." (*Ibid.*)[18]

Significantly, we cannot consider Gezzer's "one opportunity" statements in a vacuum. "[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. [Citation.]" (*Fare v. Michael C.* (1979) 442 U.S. 707, 724-725.) Gezzer emphasized the decision whether to have an attorney present was for defendant to make entirely on his own. Both times defendant said he could "say [his] side of the story," Gezzer reiterated it was entirely up to defendant, that defendant could "go with the lawyer thing" if he wanted, and that it made no difference to Gezzer. He also reiterated defendant did not have to tell his story if he did not want to do so, to which defendant replied, "Oh, okay."

As in *Gonzales*, *supra*, 54 Cal.4th 1234, defendant chose to give his side of the story "with a fully understanding of the nature of his *Miranda* rights and the consequences of abandoning them." (*Id.* at p. 1270.) Even if we assume defendant "did not fully appreciate the possible value in invoking his rights, this does not mean he was not aware of them, or did not understand the consequences of the decision to waive them." (*People v. McCurdy*, *supra*, 59 Cal.4th at p. 1087; see *Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 385; *People v. Lessie*, *supra*, 47 Cal.4th at p. 1169; *People v. Clark*

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18 Courts have sometimes found waivers to be voluntary even where officers employed deceitful tactics. (See *Soffar v. Cockrell* (5th Cir. 2002) 300 F.3d 588, 596 & cases cited.)

(1993) 5 Cal.4th 950, 986-987, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Defendant's statement was properly admitted.

III

SUPPORT PERSON

Defendant contends his rights to due process and confrontation were violated by the location and conduct of a victim advocate who was present at trial as a support person for J. We conclude any error was harmless.

A. Background

J. was nine years old at the time of trial. The People moved, in limine, that she be allowed to have a support person present during her testimony in accordance with sections 868.5 and 868.8. The prosecutor asked that one of the district attorney's victim advocates, who was not a witness in the case, be allowed to accompany J. and sit with her on the witness stand during J.'s testimony, at J.'s request. The court stated: "She's entitled to a support person. Let's have her sit on this side of the railing rather than have the support person sitting or standing right next to her."

There is no indication in the record that the support person accompanied J. to the witness stand. Early in J.'s testimony, however, when questioning turned to what happened after she and defendant entered the room with the incubator, J. suddenly asked, "Can Anna come with me?" It appears J. was upset, because the prosecutor responded, "Just take a second. Do you want some water? Just take a second, okay? Can I keep going? Can I ask you another question?"

The record does not reflect anything else concerning the support person at that point. At the conclusion of the prosecutor's direct examination of J., however, defense counsel asked for a recess. The following then took place outside the presence of the jury:

"[DEFENSE COUNSEL]: I want to put something on the record. I wanted to object to what happened just before we took the break with the victim advocate. Being able to go up and sit right in the … witness box right next to the young [J.] and almost had her arms around her.

"When walking out, the jury was still in the room, she's giving her a big hug and walking her out. Our objection to that is it tries to build in a lot more credence to this witness, that it has a prejudicial effect, I think, on the jury.

"THE COURT: I didn't see her put her arm around her, and I'm not saying she didn't, but she should not have done that.

"[DEFENSE COUNSEL]: No.

"THE COURT: Please instruct her not to do that again.

"[DEFENSE COUNSEL]: I also don't want her sitting up in the witness box with her. We talked about this yesterday. You actually indicated that she should sit out in the viewing area and not on this side of the bar, and she was on this side of the bar.

"THE COURT: I believe I said she could sit by the railing there, and that's where she sat. Then … the witness asked if she could be up there, and that's appropriate. I allowed her to come up there.

"[PROSECUTOR]: There are specific Evidence [*sic*] Code sections, which I cited in my motions in limine, that allows [*sic*] courts to give victims in these cases more accommodations than, maybe, just a regular lay adult witness might have coming in on some other type of case, specifically these situations.

"THE COURT: I think your detective just went out to instruct the advocate not to put her arm around her, either coming or going.

"[PROSECUTOR]: Yes.

"THE COURT: [Defense counsel], are you ready?

"[DEFENSE COUNSEL]: I am."

Defense counsel did not ask that the jury be admonished concerning what had occurred. The trial court did not instruct the jury specifically with respect to the support person, but did give standard instructions that, for instance, jurors had to decide what

happened based only on the evidence that was received during trial, and that evidence was the sworn testimony of witnesses and the exhibits admitted into evidence. Jurors were also given standard instructions on judging the credibility of witnesses in general and children 10 years or younger.

B. Analysis

Section 868.5, subdivision (a) provides, in pertinent part: "Notwithstanding any other law, a prosecuting witness in a case involving a violation … of Section … 288 [or] … 288.7, … shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, … at the trial, … during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand …." Subdivision (c) of section 868.8 affords the court discretion to relocate support persons and other individuals within the courtroom "to facilitate a more comfortable and personal environment for … the child witness" when the defendant is charged with violating, inter alia, section 288 or 288.7 committed upon a minor under 11 years of age.

"It is established that a support person's mere presence with a witness on the stand, pursuant to section 868.5, does not infringe upon a defendant's due process and confrontation clause rights, unless the support person improperly interferes with the witness's testimony, so as to adversely influence the jury's ability to assess the testimony. [Citations.]" (*People v. Spence* (2012) 212 Cal.App.4th 478, 514; see, e.g., *People v. Patten* (1992) 9 Cal.App.4th 1718, 1725-1733.) "'The presence of a second person at the stand does not require the jury to infer that the support person believes and endorses the witness's testimony, so it does not *necessarily* bolster the witness's testimony.' [Citation.]" (*People v. Stevens* (2009) 47 Cal.4th 625, 641.)

We find no prejudice to defendant on the facts of this case. The record does not show whether the trial court admonished the support person "to not prompt, sway, or influence the witness in any way," as required by section 868.5, subdivision (b). Although it is the better practice for the court expressly to make the required admonitions

(*People v. Spence*, *supra*, 212 Cal.App.4th at pp. 517-518), the record does not suggest the victim advocate did anything to influence J.'s testimony. "It would also have been appropriate for the trial court … to inform the jurors that the witness 'was entitled by law to be attended by a support person during her testimony,' and to admonish them that 'the support person was "not the witness."' [Citation.] In any case, since the trial court in this case gave the standard instruction that the jury must base its decision solely on the evidence received at trial, without being swayed by sympathy or prejudice, it does not appear that any claim of prejudice from the support person's presence is available on this record. [Citation.]" (*Id*. at p. 518; see *People v. Myles* (2012) 53 Cal.4th 1181, 1215.)

Defendant contends the support person "sat next to and touching" J. while J. testified. To the contrary, there is no suggestion in the record of any touching during testimony.[19] Nor is there any indication the support person "displayed emotion or gestures suggesting to the jury that she believed [J.'s] account." (*People v. Myles*, *supra*, 53 Cal.4th at p. 1214.) Although the support person put her arm around J. and possibly hugged her while walking J. out of the courtroom at the recess, the trial court had the support person admonished not to do so anymore. Defense counsel did not request that the jury be instructed to disregard whatever they saw, or ask for any other type of curative admonition.

It is significant in this case that the support person did not sit right next to J. until J. asked — in front of the jury — if "Anna" could come with her. J.'s distress had to have been apparent to jurors, since it is evident even on a written transcript. Under the circumstances, jurors would have interpreted the support person's close proximity to J. — and even the hug — as an attempt to give J. emotional support, rather than as somehow bolstering or vouching for J.'s credibility. (See *People v. Patten*, *supra*, 9 Cal.App.4th at

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19 Defense counsel's statement the support person "*almost* had her arms around" J. does not mean the two were touching. (Italics added.)

pp. 1731-1732.) This is especially so in light of the fact J. was only nine years old at the time.

Finally, defendant was convicted of the charge he admitted committing in his interview with Gezzer.[20] Since we have determined this interview was properly admitted into evidence, defendant cannot possibly have been prejudiced by anything the support person did, or any aspect of the trial court's rulings in that regard. (See *People v. Spence*, *supra*, 212 Cal.App.4th at pp. 518-519.)

IV

SENTENCING ERRORS

The probation officer recommended, and the trial court imposed, a restitution fine in the amount of $1,000 pursuant to section 294, subdivision (b). Defendant now contends the fine was not authorized under the statute and must be stricken. The Attorney General correctly concedes the issue.[21]

Subdivision (b) of section 294 provides: "Upon conviction of any person for a violation of Section 261, 264.1, 285, 286, 288a, or 289 where the violation is with a minor under the age of 14 years, the court may, in addition to any other penalty or restitution fine imposed, order the defendant to pay a restitution fine based on the defendant's ability to pay not to exceed five thousand dollars ($5,000), upon a felony conviction, or one thousand dollars ($1,000), upon a misdemeanor conviction, to be

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[20] The verdict form for count 1 specified "touched vaginal area." The verdict form for count 2 specified "mouth to vaginal area." As previously stated, defendant was convicted of count 1, but acquitted of count 2 and also count 3, which charged him with orally copulating J.

[21] At sentencing, defendant objected to the fine only on the ground of lack of ability to pay. Because the trial court exceeded its statutory authority in imposing the fine, however, defendant's lack of objection on the ground now raised did not forfeit the issue for purposes of appellate review. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 823; see *People v. Scott* (1994) 9 Cal.4th 331, 354.)

deposited in the Restitution Fund to be transferred to the county children's trust fund for the purpose of child abuse prevention."

Section 288, subdivision (a) is not one of the statutes listed in section 294, subdivision (b) for which a restitution fine can be imposed. Since the trial court was without statutory authority to impose the $1,000 fine, we will order the fine stricken. (*People v. Chambers*, *supra*, 65 Cal.App.4th at p. 823; see *People v. Breazell* (2002) 104 Cal.App.4th 298, 305.)

Although not raised by either party, our review of the record shows the trial court also orally ordered defendant to pay $300 pursuant to section 290.3. This fine (which is not challenged by defendant) is not reflected in the abstract of judgment, however.[22]

"It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 89; accord, *People v. Myles*, *supra*, 53 Cal.4th at p. 1222, fn. 14.) Accordingly, we will order that the abstract of judgment be corrected to conform to the sentence actually imposed by the court.

DISPOSITION

The restitution fine imposed pursuant to Penal Code section 294, subdivision (b) is stricken. As so modified, the judgment is affirmed. The trial court is directed to cause the abstract of judgment to be corrected to reflect imposition of a $300 fine pursuant to

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[22] Neither is the fine imposed pursuant to section 294, subdivision (b). Since that fine is being stricken, however, the omission is immaterial.

Penal Code section 290.3, and to transmit a certified copy of same to the appropriate authorities.

_____
DETJEN, J.

I CONCUR

_____
GOMES, Acting P.J.

FRANSON, J., Concurring.

I concur in the result reached by the majority. However, I want to make clear my belief that this decision should not be interpreted to condone the use of misleading investigative techniques by law enforcement to achieve a *Miranda*[1] waiver, such as was arguably done in this case.

The factual sequence here is straightforward. Suspect receives an accurate rendition of his *Miranda* rights and states that he understands them:

> "[Q]: Do you understand your rights?
>
> "[A]: Yes, [s]ir.
>
> "[Q]: [W]ith these rights in mind, … is it okay to talk to me …?
>
> "[A]: …I think probably get my lawyer 'cause, … this is a serious case."

This is an ambiguous invocation of *Miranda*, warranting a follow-up question from the detective (*People v. Duff* (2014) 58 Cal 4th 527, 553-554):

> "[Q]: … Are you saying you want a lawyer or you just thinking about it at this point?
>
> "[A]: … Probably get a lawyer 'cause you know this is some serious stuff right here."

This again is an ambiguous response, warranting another follow-up question, which the detective admits is an "investigative technique":

> "[Q]: …I just want you to make yourself clear *because you only get one opportunity to give your side of the story about what had taken place, and she gave us her side of the story.*
>
> "[A]: I could say my side of the story right now or? [¶] … [¶]
>
> "[Q]: *Well that's entirely up to you. That's why, that's why we read the rights. You cannot tell your story if you don't want to, but here's what happens-*

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

"[A]: Oh, okay.

"[Q]: *If you don't tell your story then we proceed forward and you may never get that chance again.*

"[A]: Okay, I could just say my side of the story.

"[Q]: If you want to go with the lawyer thing then you can do that to[o], that's entirely up to you. It makes no difference to me at all.

"[A]: Okay, [s]ir.

"[Q]: Okay, so which way would you rather go?" (Italics added.)

After this exchange, the defendant now waives his *Miranda* rights:

"[A]: Well, I just say a side of my story right now.

"[Q]: Okay…. Tell me your side of the story."

The issue in this case is not whether law enforcement can use deceptive tactics in questioning a suspect after proper admonition and waiver. We know this is an acknowledged and accepted practice. (See *People v. Gonzales* (2012) 54 Cal.4th at p. 1270.) But since a suspect must receive an unequivocal and clear advisement of his or her *Miranda* rights *before* they can intelligently waive them (*Miranda, supra,* 384 U.S. at p. 479), the question is whether deceptive statements can be used prewaiver to obtain a suspect's waiver and subsequent statement. On their face, "… *you only get one opportunity to give your side of the story* …" and "[*i*]*f you don't tell your story, then we proceed forward and you may never get that chance again"* (italics added) are misleading at best.

Based on the record in this case and totality of the circumstances, it is not clear whether the suspect was deceived by the comments from the detective. Was he led to believe he was giving up his right to give his "side of the story" only during this phase of the investigation or was he led to believe that he was giving up his opportunity and right to tell his side of the story forever, even at trial? We know that every defendant has the

constitutional right to testify on his/her own behalf. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-53.) Was this defendant forced to consider giving up that right by the statement "If you don't tell your story, then we proceed forward and you may never get that chance again"?

Again, the record is not clear on this point and, for this reason, I concur with the majority, although with serious reservation.

_____
FRANSON, J.

I CONCUR

_____
GOMES, Acting P.J.